IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 911-913

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DERAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION, AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Appendix.

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY (substituted third party defendant, hereinafter

referred to as "Eastern Illinois")*, and WABASH RAILROAD COMPANY (substituted third party defendant, hereinafter referred to as "Wabash"), respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter sometimes referred to as the "Circuit Court") to review the decision and judgment of that Court rendered March 17, 1943, as modified by its decision and judgment of January 21, 1944 (except that portion of the latter dealing with the Grand Trunk payment).

* The short terms used with reference to the parties include all their respective predecessors.

SUMMARY OF THE MATTER INVOLVED.

(a) General Facts.

The respondent, Western Indiana Railroad Company (hereinafter referred to as "Western Indiana"), plaintiff and third party plaintiff in the District Court, was organized in 1879. It owns and operates the Dearborn Station, one of the largest and most important railroad terminals in Chicago, Illinois, and railroad lines and facilities extending south from the station and diverging at 87th Street into two branches, one continuing south to Dolton, Illinois, and the other extending southeasterly to the Indiana state line (R. 178, 401, 676).

The main line, together with property adjacent thereto devoted to yards, switches, turnouts, engine houses and similar purposes, and practically all of Dearborn Station has been and is known as the "common property" over which Western Indiana and its various lessees operate their trains in common with each other (R. 178, 402). Western Indiana also owns certain other property, known as "exclusive property," which has been leased to some one or more of its lessees for exclusive use by the lessee and which is only collaterally and not directly involved in this proceeding (R. 402, 529-531, 609-611).

The common property of Western Indiana is used as a railroad terminal by six interstate railroads, namely, Chicago and Erie Railroad Company (hereinafter referred to as "Erie"), Grand Trunk Western Railroad Co. (hereinafter referred to as "Grand Trunk"), Holman D. Pettibone, *et al.*, Trustees of Chicago, Indianapolis and Louisville Railway Co. (hereinafter referred to as "Monon"), Eastern Illinois, Wabash and Atchison, Topeka & Santa Fe

Railway Co. (hereinafter referred to as "Santa Fe") (R. 401). Erie, Grand Trunk and Monon, together with Western Indiana, are respondents herein. Santa Fe has never been a party in the case.

These railroads enter Western Indiana's common property at different points along the system (R. 193, 401, 676), and the volume of traffic of each varies (R. 671-675). In addition, some portions of the common property are also used by the Belt Railway Company of Chicago (hereinafter referred to as "the Belt") and the Elgin, Joliet & Eastern Railway Company (hereinafter referred to as "E. J. & E.") under separate leases from Western Indiana (R. 357, 401, 659, 676).

Under their respective leases, all made subsequent to 1882 (R. 211-217, 219-221, 238-240), the Santa Fe, the Belt, and the E. J. & E. have paid their wheelage proportion of certain expenses of Western Indiana as defined in their respective leases, and have also paid to Western Indiana annually large fixed rentals (R. 357-358, 659). During 1937, a typical year, such fixed rentals were at least $499,000 (R. 344).

Western Indiana has never operated any through trains, but since 1904 it has operated suburban passenger trains over the common property, and since 1913 it has handled freight traffic thereon between connecting railroads and shippers located on its line (R. 342-344, 402).

Since 1879 Western Indiana has from time to time made leases to the five tenant owners* and has also executed a number of contracts with said five tenant owners of which two are pertinent. These two contracts, and those leases which include a demise of any part or all of the common property, contain varying definitions of Western Indiana's expenses to be paid by the five tenant owners on a wheelage

* Eastern Illinois, Wabash, Grand Trunk, Erie, and Monon.

basis. By each of said leases Western Indiana demised to the lessee or lessees the right to use, together with others enjoying similar rights, certain designated portions of its common property for a term of 999 years, and by some of said leases also demised the right to use exclusively certain of its other property.

On November 2, 1882 the five tenant owners acquired all of the Western Indiana capital stock in equal proportions, and they have at all times since so continued to own the same. By agreement, each of the five tenant owners was to be equally represented on the board of directors of Western Indiana, and at all times since that date each of the five tenant owners has been so represented by a director on said board (R. 196-198, 357).

The pertinent documents in this case are the Inter-Tenant Agreement of November 1, 1882 (hereinafter referred to as the "1882 Agreement") (R. 196-202), the Preliminary Proprietary Agreement of January 16, 1902 (hereinafter referred to as the "1902 Agreement") (R. 509-528), and the Joint Supplemental Lease of July 1, 1902 (hereinafter referred to as the "1902 Lease") (R. 529-556).

The 1882 Agreement, which covers a number of miscellaneous matters, was executed by Western Indiana, party of the first part, and the five tenant owners, parties of the second part (R. 196, 197). Paragraphs 5th and 6th thereof relate solely to the definition of Western Indiana's expenses payable on a wheelage basis and the manner of apportioning the same (R. 199-200).

The definition of such expenses in paragraph 6th covers certain enumerated expenses of Western Indiana including "all other claims and demands of every name, nature and description, for which the Western Indiana Company may be legally liable, excepting its mortgage debt and the interest thereon." (This quoted portion is hereinafter

referred to as the "all inclusive clause".) Claims and demands payable exclusively by any of the tenant owners and the cost of permanent improvements and of additions to the Western Indiana Company property are excluded entirely from such definition (R. 199-200).

Paragraph 5th provided that the parties of the second part (the five tenant owners) should pay the expenses so defined in paragraph 6th and that each of said parties undertook and agreed to pay monthly a certain proportion thereof "such proportion to be determined by the engine and car mileage of each party to the gross engine and car mileage of all the parties" over the common property (R. 199).

The 1902 Agreement is a contract of precisely the same character as the 1882 Agreement which was also executed between Western Indiana, party of the first part, and the five tenant owners, parties of the second part (R. 509-518). It provides for an entire rearrangement of the rights of the five tenant owners, which, in substance, embraced the following:

(1) The equal right to each of the five tenant owners to use the common property on an equal basis as to payment of the cost thereof (R. 222-223, 510-516);

(2) The purchase and extinguishment of all exceptional rights, privileges and exemptions theretofore enjoyed by any of the five tenant owners (R. 510-512); and

(3) In paragraph Ninth, a complete new definition of expenses of Western Indiana to be paid on a wheelage basis (limited to enumerated expenses of the common property, and enlargements and improvements thereof) and a new method of apportioning said expenses under which the proportion of each of the five tenant owners should thereafter be in the ratio of "their several wheelage uses to the total wheelage use of said railroad" (R. 223, 516).

Said 1902 Agreement further provides that these various matters be embodied in a new joint lease (R. 221-223, 513-517).

The 1902 Lease was executed for a term of 999 years (R. 227, 535) between Western Indiana, as lessor and party of the first part, the five tenant owners, as lessees and parties of the second part, and the Trustee under the mortgage to secure Western Indiana's new bond issue, as party of the third part (R. 224, 529, 548). It carried out all of the matters and things provided in the 1902 Agreement to be effectuated by said Lease (R. 224-238, 529-547).

Paragraph 33 of said Lease is practically identical with the provisions of paragraph Ninth of the 1902 Agreement. Here once more there is provided a complete new definition of the expenses of Western Indiana to be paid on a wheelage basis after July 1, 1902, which is limited to common property expenses, including enlargements and improvements thereof and additions thereto, and a new method of apportioning such expenses to each of the five tenant owners, the proportion of each to be in the ratio of "their several wheelage uses of the various portions of said railroad to the total wheelage use thereof" (R. 234-235, 543-544).

Five later joint supplemental leases, each for a term of 999 years, were executed between Western Indiana, the five tenant owners, and the mortgage trustees in 1917, 1920, 1925, 1932 and 1936 (R. 361-362, 557-626). Each refers to the provisions of paragraph 33 of the 1902 Lease and then repeats almost identically and without material change the language of paragraph 33 as to both the definition of wheelage expenses and the method of apportioning the same (R. 244-248, 361-362).

The expenses involved in C. C. A. appeals Nos. 7875,

7876 and 7877, as to which the decision of the Circuit Court is hereby sought to be reviewed, are as follows:

(1) Annual payments by Western Indiana for the cost of acquisition of certain additions to its common property which it acquired in and after 1905 (R. 309-316). The District Court held that these payments, which are frequently referred to as the "disputed rentals," should be charged to the five tenant owners on an equal basis, in line with the long continued practice of Western Indiana. The Circuit Court reversed, holding that such payments should be charged on a wheelage basis.

(2) The expenses of Western Indiana in conducting its suburban and freight switching operations, referred to frequently as "Western Indiana's separate railroad operations," which it has never since 1904 charged to the tenant owners (R. 342-352) but which the Circuit Court, reversing the District Court (which approved Western Indiana's practice), held should be charged to the five tenant owners on a wheelage basis.

(3) Certain miscellaneous charges and expenses of Western Indiana, including federal income taxes, which it has, with unimportant exceptions, never since 1902 charged to the five tenant owners (R. 352-356), but which the Circuit Court, reversing the District Court, held should be charged to the five tenant owners on a wheelage basis.

The foregoing groups of expenses for one year (1937) amounted to approximately $455,000* (R. 309-316, 350-356), and the total amounts payable under the decision of the Circuit Court during the remainder of the terms of the leases (approximately 950 years) will aggregate many hundreds of millions of dollars.

Another expense item originally involved in said three appeals was the sum of $20,665.35 paid since 1902 and pay-

* We believe this Court will take judicial notice of the fact that federal income taxes (one of the heaviest expenses) have increased very substantially since 1937.

able annually by Western Indiana to Grand Trunk until the latter shall use Western Indiana's railroad south of 49th Street in Chicago. This payment, which originated in the 1902 Agreement and was effectuated by the 1902 Lease, was and is made as compensation to Grand Trunk for its release in 1902 of certain pecuniary benefits enjoyed by it under a previous agreement dated November 1, 1891. In view of the final decision of the Circuit Court of January 21, 1944, hereinafter referred to, no review of this expense item is sought by petitioners.

The acts and conduct of Western Indiana and the five tenant owners subsequent to 1902 with reference to Western Indiana's method of handling these expenses and the charging and payment thereof, and particularly the numerous discussions of such matters and problems relating thereto by Western Indiana directors, as shown by the stipulation of facts (R. 316-357), do not reveal that at any time between 1902 and 1938 any of the parties ever asserted or claimed that any of the foregoing expenses were controlled or in any manner affected by the provisions of paragraphs 5th and 6th of the old 1882 Agreement, despite the fact that during all such period the five tenant owners owned equally all the Western Indiana stock and each had its own representative on the Board of Directors of Western Indiana.

Prior to 1938 none of the five tenant owners ever objected to or questioned the method employed by Western Indiana in handling any of the foregoing expenses, with the exception of the disputed rentals item, as to which no objection was made until 1915, when Monon first claimed that this item should be payable on a wheelage basis (but not because of the 1882 Agreement). All of the other roads, however, continued to pay such item on an equal basis as charged by Western Indiana until 1933,

when Erie and Grand Trunk for the first time commenced paying on a wheelage basis (but again not because of the 1882 Agreement) (R. 316-357, 421-426).

(b) History of the Litigation.

The litigation was commenced by a complaint filed by Western Indiana in the District Court of the United States for the Northern District of Illinois, Eastern Division (herein referred to as the "District Court"), against Erie, in which it was charged that although Erie had paid its proper proportion of Western Indiana's management expenses through March, 1933, it had thereafter refused to pay such proportion of such expenses. Judgment for $114,071.13 was demanded (R. 2-25).

Erie's answer (R. 25-46) included a counterclaim (R. 28-46) (to which Western Indiana replied) in which it demanded judgment for $126,852.72 because of alleged overpayment by it on account of such management expenses plus $121,804.97 on account of alleged overpayment of its proportion of other expense items allegedly payable by the five tenant owners on a wheelage basis, and sought an accounting as to certain other alleged expense items.

Thereupon, Western Indiana filed a third party complaint (R. 57-64) making third party defendants the remaining four tenant owners, Grand Trunk, Monon, Eastern Illinois and Wabash. It subsequently filed an amendment to said third party complaint (R. 373-376). By these pleadings it sought a declaratory judgment as to the respective rights and liabilities of itself and the third party defendants respecting the expenses involved in this case and sought an accounting and judgment thereon against each third party defendant for the amount which might be found due from it (R. 64, 376). The reason stated by Western Indiana for seeking such declaratory judgment

was that if the methods then pursued by it in handling all of said expense items were not correct, it was without knowledge as to the proper methods to use, and therefore it sought the advice and assistance of the Court. (R. 62-64, 375-376).

In an amendment to its reply to the Erie counterclaim, Western Indiana sought similar relief against Erie (R. 370-372). Erie filed a reply to this pleading in which it asserted numerous defenses (R. 377-381).

Answers were filed to the third party complaint by all of the third party defendants alleging numerous defenses (R. 65-101, 169-174, 389-395); Grand Trunk and Monon also filed substantially similar counterclaims against Western Indiana and Erie and cross-claims against their third party co-defendants (R. 89-101), which injected the balance of the expense items involved in this case. Appropriate responsive pleadings were filed to these counterclaims and cross-claims (R. 67-76, 79-91, 95-96, 101-132, 154-157, 164-168, 174-176, 367-368).

The case was heard in the District Court entirely upon a stipulation of facts (R. 177-358), a supplemental stipulation of facts (R. 359-365), the leases, the 1882 Agreement, the later 1902 Agreement and other exhibits.

The District Court by its decision (R. 382-388), decree (R. 442-447), findings of fact (R. 401-435) and conclusions of law (R. 435-440), held among other things:

> (1) that since 1902 paragraph 33 of the 1902 Lease (which effectuated the provisions of paragraph Ninth of the 1902 Agreement) has been the controlling agreement between Western Indiana and the five tenant owners defining the expenses of Western Indiana for which it is to be reimbursed directly by said five tenant owners on a wheelage basis and providing the method of apportioning such expenses among said five tenant owners;

(2) that said paragraph 33 and paragraph Ninth provided a new definition of such wheelage expenses and a new method of apportioning the same among the five tenant owners;

(3) that the provisions of these paragraphs, being inconsistent with the provisions of earlier agreements and leases on the same subject matter, superseded and abrogated all such earlier provisions and, specifically, superseded and abrogated the provisions of paragraphs 5th and 6th of the 1882 Agreement; and

(4) that this result was intended by Western Indiana and its five tenant owners (R. 387, 410-411, 435-436, 442-443).*

Four separate appeals were prosecuted from the decree of the District Court as follows: (1) by Grand Trunk, C. C. A. No. 7875; (2) by Monon, C. C. A. No. 7876; (3) by Western Indiana, C. C. A. No. 7877**; and (4) by Erie, C. C. A. No. 7878.

On March 17, 1943 the Circuit Court rendered a decision, opinion by Evans, Circuit Judge (140 F. 2d 120), in appeals Nos. 7875, 7876 and 7877(R. 710-721), reversing the decree of the District Court. The Circuit Court rejected the view of petitioners and of the District Court that paragraphs 5th and 6th of the old 1882 Agreement were superseded and abrogated by the 1902 Agreement and Lease, and held that the "all inclusive clause" in said paragraph 6th is still effective and controlling as to the definition of expenses of Western Indiana payable on a wheelage basis, and that therefore the five tenant owners are liable on a wheelage basis for all of the expense items involved in said appeals.

The opinion discloses that the Court's decision of this

* The findings of fact and conclusions of law upon which the foregoing summary is based are set forth in the Appendix, pp. 29-30.

** The Western Indiana appeal was taken only to protect its position as against its tenants regardless of the decision rendered by the Circuit Court of Appeals.

important litigation was predicated entirely upon the erroneous theory, original with the Court and neither urged nor raised by any respondent,* that paragraph 37 (R. 236, 545) of the 1902 Lease (which provision the Court held to be controlling) referred to and included the old 1882 Agreement (which is not a lease), and preserved paragraphs 5th and 6th thereof (R. 718-721).

But paragraph 37** refers only to "said existing *leases*" which are listed in paragraph 3 of said 1902 Lease (R. 530-531). The 1882 *Agreement* is not there listed.

Throughout the opinion, however, Evans, Circuit Judge, has used interchangeably the words "lease" and "agreement" as though they were synonymous, and has treated the 1882 Agreement as though it was one of "said existing leases."

The Court cast aside and gave no effect to the provisions of the 1902 Agreement upon which the newly discovered evidence (subsequently discussed) has an extremely important bearing. It held that this Agreement was merely preliminary in fact and that it was merged in the 1902 Lease (R. 719). The stipulated facts (R. 177-365), however, particularly as augmented by such newly discovered evidence (R. 779-916), clearly show and establish beyond doubt that the 1902 Agreement was the paramount instrument and that the 1902 Lease merely carried out and effectuated the provisions contained in said 1902 Agreement.

In this same opinion, the Court stated that the only question presented for its determination was what effect the 1902 Agreement (evidently meaning the 1902 Lease) had upon existing leases (R. 719). However, after so stating and characterizing this question, the Court ignored it completely and never rendered any decision thereof.

* The briefs filed by respondents in the Circuit Court have been certified to this Court.

** Set out in full, *infra*, p. 20.

On March 19, 1943 the Circuit Court rendered a separate decision, opinion also by Evans, Circuit Judge (140 F. 2d 126), in the Erie appeal, C. C. A. No. 7878,* which also reversed the decree of the District Court but dealt only with the issue involving the method of apportioning management expenses. The Court based its decision in this appeal, however, on the theory that paragraph 33 of the 1902 Lease was the controlling provision, which was in accord with the contentions of both Western Indiana and Erie, the only parties to said appeal.

On March 31, 1943 Eastern Illinois and Wabash seasonably filed a petition for rehearing in appeals Nos. 7875, 7876 and 7877 in which they pointed out the basic errors in the Circuit Court's decision in said appeals. In the interest of brevity, we respectfully refer this Court to that petition (R. 725-758).

On July 2, 1943 and while the petition for rehearing was still pending, Eastern Illinois and Wabash filed their petition for leave to present certain newly discovered evidence, consisting entirely of duly certified copies of or excerpts from the original files and records of Western Indiana (R. 772-928). As alleged in said petition, part of said new evidence was offered to show exactly how the amount of the Grand Trunk payment was arrived at and that such payment was to be borne by the five tenant owners equally, as contended by Eastern Illinois, Wabash and Erie, and not on a wheelage basis, as contended by Grand Trunk and Monon** (R. 778-779).

Also as alleged in said petition, the balance of said newly discovered evidence was offered to show: (1) that the 1902 Agreement was not a casual or mere preliminary document, but that it was the result of prolonged and most careful

* Set forth in full in the Appendix, p. 12.

** This portion is no longer in controversy, in view of the January 21, 1944 final decision of the Circuit Court hereinafter referred to.

study and consideration by the representatives of the five tenant owners and by the Western Indiana directors; (2) that in 1900 the parties were not satisfied with the arrangements under which they were working and had been endeavoring for some time past to find a solution of their difficulties and to arrive at the basis of a new agreement (R. 779-780); (3) that at a meeting in July 1900, which initiated the protracted and arduous negotiations and discussions which culminated in the 1902 Agreement, their authorized representatives, after prolonged debate, unanimously adopted the following resolution:

> "RESOLVED, That we believe it to be for the interest of both the Western Indiana Railroad and each of its proprietary tenants that all existing contracts between them be cancelled and a new agreement be entered into between such proprietary tenants and this Company that shall require each of said tenants to bear equally the cost of the existing joint property which they have a right to use under present rentals and all future improvements and betterments thereon, and that shall require each tenant in the future to pay all operating expenses and taxes in proportion to their respective wheelage on said property, and that for this purpose in such adjustment the fair value of special contract advantages shall be adjusted.
>
> "FURTHER, That in case for any reason this cannot be legally done, a contract that shall efficiently accomplish this object shall be made.
>
> "RESOLVED FURTHER, That the proper officers of this Company be requested to take such action as they shall deem practicable to bring about this result." (R. 780);

(4) that the 1902 Agreement was prepared and entered into pursuant to said resolution, and (5) that the parties fully intended that paragraph Ninth of said Agreement should supersede and abrogate the provisions of paragraphs 5th and 6th of the old 1882 Agreement, which was the exact result accomplished under the applicable rule of

law as maintained by Eastern Illinois and Wabash and as held by the District Court (R. 780-782).

On January 21, 1944 the Circuit Court rendered its final decision, opinion also by Evans, Circuit Judge (140 F. 2d 130) (R. 944-947), denying the petition for leave to present newly discovered evidence for the reasons that (1) it was inadmissible because "the written agreement in question" (although not identified by the Court) was not ambiguous, and (2) "a study of this evidence fails to substantiate the claim that the parties actually intended to apportion certain items of cost on an equal basis, rather than upon the wheelage basis" (R. 946-947).

The reasons ascribed by the Court for denying the petition are entirely unrelated to, and show a complete misconception of, the purposes for which the evidence was offered.

The Court held that diligence was shown in presenting the new evidence and that the Court had power to allow the petition (R. 946). The authenticity of the evidence was not challenged by any respondent.

The Court also in its final decision of January 21, 1944 denied the petition for rehearing, but it admitted that its previous decision as to the Grand Trunk payment was erroneous. It reversed this decision and held that said payment was apportionable among the five tenant owners on an equal basis (R. 947).

The three opinions of the Circuit Court and the opinion of the District Court are set forth in full in the Appendix at pages 1, 12, 18 and 22, respectively.

Basis for the Jurisdiction of This Court to Review the Judgment in Question.

(1) The statutory provision believed to sustain the jurisdiction of this Court is Section 347(a) of Title 28, U. S. Code Annotated.

(2) This petition was filed in this Court within the time required by Section 350 of Title 28, U. S. Code Annotated.

The first decision of the Circuit Court, in appeals Nos. 7875, 7876 and 7877, was rendered March 17, 1943 (R. 710). The petition for rehearing in such appeals was seasonably filed by petitioners on March 31, 1943 (R. 723). The final decision of the Circuit Court denying the petition for rehearing and rendering final judgment was made January 21, 1944 (R. 944). The time for filing this petition did not begin to run until January 22, 1944 (*Morse* v. *The United States,* 270 U. S. 151; *National Labor Relations Board* v. *Mackay R. & T. Co.,* 304 U. S. 333, at 344); so that this petition is seasonably filed. The mandate of the Circuit Court has been stayed to permit the filing of this petition (R. 954).

Questions Presented.

(1) Which is the controlling lease or contract provision which has, since 1902, defined the expenses of Western Indiana to be paid by the five tenant owners on a wheelage basis and provided the method of apportionment thereof?

(a) Does the definition of such expenses in paragraph 6th of the 1882 Agreement still control, or has such provision been superseded and abrogated by the later definition contained in paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease and reiterated in five later leases?

(b) Does the method of apportionment of the wheelage expenses provided in paragraph 5th of the 1882 Agreement still control, or has such provision

been superseded and abrogated by the language in said paragraph Ninth and said paragraph 33 and reiterated in five later leases?

(c) Does paragraph 37 of the 1902 Lease relate to or in any manner affect paragraphs 5th and 6th of the 1882 Agreement?

(d) What is the effect of the acts and conduct of the parties subsequent to 1902 upon this fundamental question as to which is the controlling provision?

(2) If this Court should hold that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease have been, since 1902, the controlling provisions defining expenses of Western Indiana to be paid on a wheelage basis and the method of apportionment thereof, do any or all of the expenses hereinbefore listed come within the scope of said definition?

(3) If this Court should hold that the definition of expenses in paragraph 33 of the 1902 Lease and the other provisions of said paragraph did not supersede and abrogate prior lease and contract provisions because of paragraph 37 of such 1902 Lease, and that paragraph 33 does not come within the scope of the exception, "except as herein otherwise specifically provided," in said paragraph 37, do any or all of the expenses hereinbefore listed come within the scope of the provisions of any of "said existing leases" defining expenses payable on a wheelage basis?

(4) If this Court should hold that paragraphs 5th and 6th of the 1882 Agreement are still in force and effect, do any or all of the expenses hereinbefore listed come within the definition of expenses payable on a wheelage basis in paragraph 6th?

(a) Even if this Court should hold that paragraph 6th is controlling, is the cost of acquisition of the additional property (the "disputed rentals" item) within the exception clause at the end of said paragraph?

(b) Are franchise taxes and federal income taxes of Western Indiana included within the scope of the definition in said paragraph 6th?

(5) Did the Circuit Court err in denying the petition for newly discovered evidence?

(6) In the event this Court should hold that paragraphs 5th and 6th of the 1882 Agreement are still controlling as to the payment of wheelage expenses, then the following questions, undecided by the Circuit Court, should be decided:

(a) Did the base provided in paragraph 33 of the 1902 Lease for determining the wheelage proportion of each of the five tenant owners change, modify or supersede the base for determining such proportion provided in paragraph 5th of the 1882 Agreement?

(b) In determining the wheelage proportion of each tenant owner, should the base include the wheelage of the Belt, the E. J. & E., and the Santa Fe?

(c) In determining such proportion of each tenant owner, should the base include the wheelage of Western Indiana?

(d) In connection with the suburban operation and freight switching activities of Western Indiana, should the gross expenditures in connection therewith or only the loss, if any, incurred in such operations (considered either in combination or separately) be billed by Western Indiana to the five tenant owners on a wheelage basis?

(e) Should Western Indiana's proportion of the common property expenses be included in its expenses of suburban operation and freight switching?

Reasons Relied On for Allowance of the Writ.

The petitioners seek a review by writ of certiorari of the decision and judgment of the Circuit Court for the following reasons:

I.

The Circuit Court reversed the judgment of the District Court upon a patently erroneous theory, originated by the Circuit Court itself, which was not shown by any of the pleadings, findings of fact, conclusions of law, opinion or decree of the District Court, not referred to in any Statement of Points on Appeal, and not contended for by appellants in the Circuit Court.

The Court construed paragraph 37 of the 1902 Joint Supplemental Lease, which reads as follows:

> "That nothing herein contained shall in any way alter, impair or affect *said existing leases*, or any or either of them, or any matter or thing therein, except as herein otherwise specifically provided." (Italics supplied.)

as referring to and including the 1882 *Agreement*, which no one claims is a *lease*, or, *a fortiori*, one of "said existing leases" referred to in paragraph 37. "Said existing leases" are specifically listed in paragraph 3 of the 1902 Lease; the 1882 Agreement is not even mentioned. Yet the Court held that the effect of this paragraph (37) in the 1902 Lease is to preserve paragraphs 5th and 6th of the 1882 Agreement. The Court not only treated the term "leases" as being synonymous with the term "agreement," but also treated the 1882 Agreement as though it was one of the leases listed in paragraph 3 of the 1902 Lease. Its entire decision and judgment was grounded on this erroneous interchange of the two terms and the fundamental misconception that the phrase "said existing leases" in paragraph 37 includes the 1882 Agreement.

In so deciding, the Court has so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

II.

Proceeding upon its own erroneous theory that paragraph 37 of the 1902 Lease is controlling, the Circuit Court stated that the only question presented was "the effect of the 1902 Agreement (meaning lease) on existing leases" (parenthetical matter supplied). But, after posing this single question for its ultimate determination, the Court completely ignored it and never decided it. The Circuit Court thereby again so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

III.

The Circuit Court has rendered two conflicting decisions in separate appeals from the same decree, upon the same stipulated facts and involving the same instruments. This is an even more serious conflict than one between the decisions of Circuit Courts of Appeal of different circuits.

The Court recognized that the fundamental question to be determined is, which are the controlling provisions as to the reimbursable expenses of Western Indiana and the method of apportioning them, viz., paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease, on the one hand, or paragraphs 5th and 6th of the 1882 Agreement, on the other. However, its decision in appeal No. 7878 was rendered on the theory that the 1902 Lease was controlling, whereas its decision in appeals Nos. 7875, 7876 and 7877 was rendered on the theory that the 1882 Agreement was controlling. Thus, its two separate decisions are

in irreconcilable conflict on the fundamental question involved.

Furthermore, the Circuit Court originally held (appeals Nos. 7875, 7876 and 7877) that the Grand Trunk payment was controlled by the 1882 Agreement, but in its final opinion of January 21, 1944 it confessed error as to this holding and decided that this item should be borne equally by the five lessees. Since the Court excluded the newly discovered evidence relating to this item, and there is no language in the 1882 Agreement excluding such item from the provisions thereof, this last decision must also have been made on the theory that the 1902 Lease was controlling. Hence, not only is there a conflict in the two decisions of the Court on separate appeals, but, in addition, there is a conflict in its two decisions on the same appeals.

IV.

In rendering separate decisions upon different appeals from the same decree predicated upon such conflicting theories, the Circuit Court has again so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

V.

Although the third party complaint in this case sought a declaratory judgment adjudging and declaring the rights and liabilities of the parties as to all of the reimbursable expenses of Western Indiana and as to the proper method and means of apportioning the same among the parties liable therefor, several questions were left wholly undecided. These questions, although argued by the parties, have become important only as a result of the erroneous decision rendered by the Circuit Court on the fundamental and controlling question. The undecided questions have

been stated herein under "Questions Presented" (*supra*, p. 19).

Unless this Court corrects the fundamental error in the Circuit Court's decision, these undecided questions will inevitably result in further litigation among the parties.

If upon review this Court reverses the Circuit Court and corrects the basic error committed by it, all of these questions will disappear, and further litigation which would otherwise be engendered thereby will be avoided, with resultant saving of both time and labor to the courts.

Petitioners respectfully request this Court to exercise its power of supervision and allow the writ so that these questions will be completely and finally settled.

VI.

In considering the foregoing reasons for the allowance of the writ, petitioners respectfully ask this Court to take into consideration the importance of this case. The decision of the Circuit Court, involving as it does a determination of the liabilities of these five interstate railroads with respect to expenses relating principally to their common Chicago terminal under the leases and contracts involved herein, has imposed upon the five lessee railroads the burden of paying on a wheelage basis practically all of Western Indiana's expenses involved in the appeals hereby sought to be reviewed, contrary to the decision of the District Court, which held none of such expenses so payable.

These expenses will continue to be so payable for more than 950 years and will aggregate hundreds of millions of dollars; and, unless the fundamental error in the decision of the Circuit Court as to which is the controlling instrument is corrected by this Court, such error will be perpetuated for more than 950 years to come.

The case is of such importance as to warrant the exercise by this Court of its power of supervision.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send up to this Court, on a day to be designated therein, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the decision and judgment of said Circuit Court of Appeals of March 17, 1943, in Nos. 7875, 7876 and 7877, and the order of said Court of January 21, 1944, so far as it denied the petition for the admission of newly discovered evidence and the petition for rehearing, be reversed and the decree of the District Court be affirmed; and that your petitioners be granted such other and further relief as may seem proper.

Respectfully submitted,

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